1967

The State of Utah, By and Through its Road Commission v. Eva White and Noel White, Her Husband : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff, Respondent,

—vs.—

EVA WHITE and NOEL WHITE, her husband,
Defendants, Appellants,

Case No. 10832

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third Judicial District for Salt Lake County Honorable A. H. Ellett, Judge

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PRINTED BY SALT LAKE TIMES

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(Numbers in parentheses refer to pages of the record. The parties will be referred to here as they appeared in the trial court.)

STATEMENT OF THE KIND OF CASE AND DISPOSITION IN LOWER COURT

On November 22, 1965, Plaintiff commenced an action in the District Court of Summit County, State of Utah, to condemn 17.70 acres of the Defendants' lands and im-

provements situate in Summit County, State of Utah, said lands to be utilized for the purpose of constructing a portion of Interstate Highway I-80. (R. 12, 13, and 80)

The authority for the taking was not in dispute and the sole issue before the Court was a determination of the amount to be paid Defendants for the lands and improvements taken and the severance damage caused by such taking.

The case came on for jury trial in the District Court of Salt Lake County, by order of the court, before the Honorable A. H. Ellett, Judge, on the 28th day of November, 1966, and was concluded on November 29, 1966.

A judgment on the verdict was duly entered awarding Defendants the sum of $56,000.00 for the lands taken, $29,000.00 for the improvements taken, and nothing for severance, for a total award of $85,000.00.

Thereafter, Defendants filed a Motion for an Additur, or, in the Alternative, a New Trial which, after hearing, was duly denied. Whereupon this appeal was instituted.

RELIEF SOUGHT ON APPEAL

The Defendant landowners, by this appeal, seek a reversal of the trial court's ruling in denying their Motion for a New Trial, and an Order of this Court granting a new trial.

STATEMENT OF FACTS

On November 22, 1965, Defendants were the owners of approximately 201 acres of land located about 17 miles east of Salt Lake City, Utah, and one-quarter mile west of Kimball's Junction along U.S. Highway 40, in Summit County, State of Utah (R. 4, 12, 26, and 27) (Exhibit P-1). Said property was divided into two parcels by U.S. Highway 40 which extended across said lands in a general northwest-southeast direction (R. 4).

At that time, the Defendants' lands fronted on and enjoyed unrestricted access to U.S. Highway 40 on both sides of said highway (Exhibit P-1, P-2 and R. 14, 15, 18, 27, and 28). The parcel of land located on the southerly side of the highway had a gradual slope from the highway to a bench area some 10 to 30 feet higher than the highway (R. 20). There were no improvements located upon this parcel of land with the exception of a gravel pit in one corner near the highway (R. 28). A portion of said land had been used for raising alfalfa with the balance remaining in a natural state of wild grass and sagebrush (R. 28 and 29). After the taking, this particular parcel comprised about 95.41 acres (R. 13).

The parcel of land on the northerly side of the highway was approximately level with the highway to a depth of about 600 feet and for a frontage of about 1300 feet (R. 30 and 73). The remainder of the frontage on the north side was lower than the highway and sloped down to a creek, thence easterly from the creek up a hillside (R. 30 and 73). After the taking, this parcel comprised about

81.39 acres less 5 acres along the creekbed which Defendants had previously sold to one Robert McComb (R. 13, 34 and Exhibit P-1). Located upon the level portion of this tract and near the highway were three structures. One was a building approximately 36 feet by 65 feet comprising 4,040 square feet and utilized for the purpose of conducting a cafe business and sale of soft drinks and beer (R. 34, 35). Attached to and forming a part of this building were modern living quarters consisting of seven rooms, with one room converted to a walk-in freezer (R. 38, 45, 120). The portion of this building devoted to cafe business was constructed in 1947 or 1948 of block construction with a false cedar siding front (R. 34, 39, and 43). The walls and ceiling of the cafe were finished in knotty pine except for a portion back of the bar which was finished in cherrywood paneling and the overflow dining room which was plaster finish (R. 38, 39, 132 and Exhibits D 3, 4, 5, 6, 7, 8, 9, 10).

A second building was located to the rear of the cafe building and comprised a 10-unit motel and laundry room comprising 2491 square feet (Exhibit P-1 and P2, R. 37, 38, 120 and Exhibits D 6, 7, and 8). Although this particular building was not located within the area of the proposed Interstate Highway I-80, it was stipulated by counsel at the time of trial that the proximity of the highway was so near the motel, that its value was totally destroyed and therefore, the Plaintiff would consider said motel development as an item to be totally compensated for in the trial of the case (R. 21, 22, and Exhibit P-1). The motel unit was of cinderblock construction with metal

roof and knotty pine walls and ceiling finish on the interior. Five units were carpeted and each unit had a shower, toilet, basin and individual heating (R. 43 and 133). The motel was constructed in 1947 or 1948 (R. 43).

Also on the date of taking, a third building existed south of the main cafe building which was an old frame home with a partial cinderblock basement comprising 1,110 square feet (R. 44, 120). The partitions of the rooms had been removed and the structure was in a poor condition (R. 31, 45, 46).

The improvements were serviced by a 268-foot private water well and a pumping system located beneath the cafe building, and the sewage was disposed of by septic tank and leeching fields (R. 40 and 41).

On the date of taking, November 22, 1965, the Defendants were conducting upon the land and premises herein referred to a general cafe and motel business and were residing upon said lands (R. 35, 47, 58). The customers for said business were derived primarily from the passing motorists (R. 47).

Subsequent to the taking, and prior to the date of trial, the Plaintiff entered upon the condemned property and wrecked the improvements to the extent that the old residence located south of the main cafe building was totally demolished and removed and the interiors of the cafe and motel buildings were gutted and the improvements were otherwise reduced to a state of great disrepair and delapidation (R. 48, 71, 202-203 and Affidavits introduced in support of Motion for New Trial).

On the date of trial, the motel was being used as a stable for horses and the interior of the cafe had been completely gutted.

After the taking, the property will have only limited access by frontage roads (R. 80, 81, 82, Ex. P-1 and P-2), the northerly parcel being serviced by an interchange at Kimball's Junction, one quarter mile southeast of the property and the southerly portion having access by two interchanges, one at Kimball's Junction and the other at Parley's Summit, some 4 miles west of the parcel of land (R. 16, 80, 109, 110, Ex. P-1 and P-2).

STATEMENT OF POINTS RELIED UPON

POINT I.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL UPON THE GROUNDS THAT THE COURT COMMITTED ERROR IN ALLOWING THE JURY TO VIEW THE IMPROVEMENTS UPON THE PREMISES.

POINT II.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL ON THE GROUNDS THAT THE JURORS WERE GUILTY OF MISCONDUCT IN VIEWING THE IMPROVEMENTS CONTRARY TO THE ADMONITION OF THE COURT.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL UPON THE GROUNDS

THAT THE COURT COMMITTED ERROR IN ALLOWING THE JURY TO VIEW THE IMPROVEMENTS UPON THE PREMISES.

78-34-11 U.C.A. 1953 fixes the time for determining value of the land and the damages "at the date of the service of the summons." Therefore, November 22, 1965, becomes the prime and critical date in the instant case for determining Defendants' damages, and the condition of the premises on that date is controlling and of significant importance. Under the evidence and testimony, we believe there was no necessity of viewing the premises and particularly the improvements thereon and that the Court committed error in permitting the jury to view the same.

Over the objection of counsel and at the conclusion of the testimony and evidence, and prior to summation or deliberation, the Trial Court directed the jury to be taken by the Sheriff of Salt Lake County to view the subject properties (R. 202, 203, and 204).

It is interesting to note that nowhere in the testimony was there any substantial conflict in the description of the lands, and upon inquiry by the Court, all of the jurors signified that they had previously seen the property which was the subject of this litigation (R. 202). Due to such indication, the trial judge commented that under the circumstances, it probably would not be necessary for the jury to view the premises, however, after further inquiry to determine how many of the jurors had previously been inside the cafe building known as "Bill and Eva's" and an indication that only two of the jurors had been in said building, the judge then concluded that it

would be proper to allow the jury to view the premises (R. 202), the Court well knowing that the building at that time was in a state of great disrepair and could not possibly reflect the condition as of the date of taking. As a matter of fact, one structure had been removed from the premises, the interior of the cafe building gutted, and the motel structure gutted and being used as a horse stable (R. 48, 71 and affidavits filed in support of Motion for New Trial).

The improvements were a major item of damage, and during the trial of the case, the Defendants presented photographs of the pertinent structures (Exhibits D 3,4,5, 6,7,8,9,10) which were designed to reflect the improvements as of the date of taking. The Plaintiff had an opportunity to preserve and present the same evidence had it so desired.

There seems little doubt but that the weight of authority supports the proposition that a view of the premises in a condemnation action is within the sound discretion of the Court, however, it seems equally well settled that such discretion must not be abused to the extent of violating the substantive rights of any of the parties. (See 103 A.L.R. 163.)

The better reasoned cases seem to hold that it constitutes error and an abuse of discretion on the part of the trial judge to allow a view where the condition of the premises has so changed as to no longer reflect the condition of the property on the date of the taking or to be of any assistance to the jury in its deliberations. One of

the leading landmark cases on this particular point is the case of *Chicago v. Koff*, 341 Ill. 520, 173 N.E. 666. In this action, a petition was filed to condemn certain property for the widening of a street. At the time of the hearing, some 4 years after the petition had been filed, the property had greatly deteriorated owing to inability to lease it advantageously because of the existence of the widening proceedings and the fact that a receiver had taken charge under the mortgage.

In holding that under such circumstances it was an abuse of discretion to allow the jury to view the premises, the Court there said:

> "There is no method by which there may be preserved in a bill of exceptions the evidence of the manner in or extent to which the minds of the various members of the jury were impressed by a view of the building, and where, as here, such changes have taken place as to render a view of no assistance to the jury, for the reason that the condition at the time of the trial does not reflect the value as of the time the petition was filed, it is an abuse of discretion to permit such view. It will be conceded that a photograph which does not present a true picture of an object as of the time to which the evidence concerning it relates is not admissible in evidence except it be with a full explanation of the changes, and we are of the opinion that in this case the building showed such deterioration that a view of the premises should not have been permitted. Such view could scarcely have been said to be of any assistance to the jury in understanding the evidence offered concerning the property."

Also, in the case of *Ajootian v. Director of Public* Works (1959) R.I. 155 A2nd 244, 77 A.L.R. 2nd 571, the property in question had materially changed for the worse between the date the action was commenced and the date of the hearing, and the Court there held that it was an abuse of the Trial Court's discretion to allow a view of the premises and further held that it was prejudicial to the land owners' right to a fair hearing.

Of further interest, is the case of *United States v. 1475.23acres* (1957, DC NY) 151 F. Supp. 590 2nd; *U.S. v. Bobinski* (CA2) 254 F2nd 686, wherein the Court said:

> "While a view of the property by the court, jury, or commission is not now required, it is considered advisable, where possible, *and when the physical characteristics* of the land and improvements have not so changed since the taking as to impair the value of personal inspection." (Emphasis added) 77 A.L.R. 2d 569.

Of further significance are the cases which have held that although a view of of the premises is within the sound discretion of the Court, it does not constitute an abuse of such discretion where a view is *denied* because of changed conditions. In this regard see: *Aleverti v. Walla, Walla,* 162 Wash. 487, 298 P. 698, and *J. H. Mai and Lena Mai v. Garden City Kansas,* 177 Kan. 179, 277 P2d 636.

In many cases the courts have consistently held that it would constitute prejudicial error to permit a view of the premises where said properties have been improved between the date of taking and the trial date, holding that

a view would not be of any material assistance to the jury and may unfairly prejudice the jury. In this regard see: *Fitch v. State Highway Commission,* 137 Kan. 584, 21 P2d 318.

When we consider the vast differences between the damages assessed by the appraiser for the Plaintiff: $75-432.00 (R. 153), and the damages assessed by appraisers for the Defendants: $141,500.00 (R. 79), and $152,921.00 (R. 123), it seems quite obvious that some distorted factor entered into the picture to influence the minds of the jury in assessing the total damages and we submit that a view of the dilapidated buildings did in fact greatly and materially contribute to the overall penurious award.

POINT II.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR NEW TRIAL ON THE GROUNDS THAT THE JURORS WERE GUILTY OF MISCONDUCT IN VIEWING THE IMPROVEMENTS CONTRARY TO THE ADMONITION OF THE COURT.

It was pointed out to the Court by counsel for both parties that the improvements on the premises were dilapidated and in a gutted condition at the time of trial (R. 202, 203), and as borne out by the testimony of various witnesses (R. 48, 71, 202, 203). Furthermore, counsel for Defendants objected to a view of the improvements and advised the Court that such a view would not be of any assistance to the jury (R. 202, 203).

Under these circumtances, the Court admonished the jury that they could view the land and the exterior of the

improvements, but that it would be of no help studying the inside of the buildings (R. 204). Obviously, the Court was aware of the inherent danger of permitting a view of the interior of the buildings under the circumstances and the intrinsic danger of prejudice developing in the minds of the jurors, which would be detrimental to the substantive rights of the Defendants.

In the light of this condition and the admonition of the Court, the jury, which was placed in the custody of the Sheriff of Salt Lake County, was taken to the subject property and there permitted to view the same.

Contrary to the admonition of the trial judge, the jurors did in fact make an inspection of the improvements in their dilapidated condition, which included a detailed inspection of the interior of the structures. (Affidavits filed in support of Defendants' Motion for New Trial).

This conduct on the part of the jury was not discovered until after the trial had been concluded and the verdict rendered due to the fact that the jury was taken to view the premises without the judge or counsel being in attendance.

To what extent such unauthorized view influenced the minds of the jurors we cannot say, but certainly the substantive rights of the Defendant landowners were jeopardized. Had the Court intended such a view of the interior, it would have been necessary to establish a more complete and detailed foundation, and for the same reason that a photograph is not admissible in evidence without

first establishing an adequate foundation, a view of the improvements was error.

In the absence of such a proper foundation, the danger is ever present of the attention of the jury being invited to portions and conditions of the premises not properly before it for consideration.

The actions and conduct of the jurors in viewing the premises has of necessity been established by the affidavits secured by both Plaintiff and Defendants in support of and in opposition to the Motion filed by Defendant landowners for a new trial of the case. It is of interest to note that the affidavits procured by the Plaintiff and filed in opposition to Defendants' Motion for New Trial, corroborated the affidavits submitted by the Defendant landowners to the effect that the jurors did in fact make an inspection of the interior of the improvements located upon the land contrary to the court's admonition.

The Utah Supreme Court in the case of ***White v.*** *Pease, et al.,* 15 Utah 170, 49 P. 416, and the case of *Wright v. U.P. R.R. Co.,* 22 Utah 338, 62 P. 317, has recognized the principal that affidavits of jurors may be reviewed on appeal if properly preserved in the record by inclusion of said affidavits as part of the Motion for New Trial.

The general rule, it is true, is to the effect that jurors may not by affidavit impeach their verdict, which principal of law seems well founded, however, this rule seems primarily designed to protect the sanctity of jury deliber-

ations and conduct within the jury room. The conduct of the jury complained of here was such that others could have observed it if present and therefore does not violate the sanctity of the jurors' deliberations. Furthermore, the conduct complained of occurred prior to the submission of the case to the jury.

In the case of *City of Miami v .Frances Bopp,* 158 So. 89 and as cited in 97 A.L.R. 1035, the Court there discussing the use of affidavits said:

> "It is true, as a general rule, on the ground of public policy, that the affidavit, deposition, or statement of a juror will not be received to impeach his own verdict; but this court has heretofore recognized exceptions to that rule, and especially that exception which is generally recognized by the courts of this country.

In *Linsley v. State,* 88 Fla. 135, 101 So. 273, 275, we said:

> *"It is upon grounds of public policy that the rule is observed that the affidavit, deposition, or statement of a juror will not be received to impeach his own verdict; but this rule relates to matters resting in the personal consciousness of the juror, as said by Mr. Justice Brewer in Perry* v. *Bailey,* 12 *Kan.* 539. *When a juror is heard to impeach his own verdict because of some matter resting in his own consciousness, the power is given to him to nullify the expressed conclusions under oath of himself and eleven others.* 'The general rule is that affidavits of jurors are admissible to explain and uphold their verdict, but not to impeach and overthrow it. But this general rule is subject to this qualification, that *affidavits of jurors may be received, for the purpose of*

avoiding a verdict, to show any matter occurring during the trial or in the jury room which does not essentially inhere in the verdict itself.'

"The rule announced in the Kansas case seems to us to be a salutary one and more consistent with reason and sound policy. That rule, as announced by Mr. Justice Brewer, is that *all those matters lying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing, and therefore accessible to the testimony of others and subject to contradiction; the interests of justice will be promoted and no sound public policy disturbed, if the secrecy of the jury box is not permitted to be the safe cover for the pepetration of wrongs upon parties litigant.* If the jury has been guilty of no misconduct, no harm has been done by permitting their testimony to be received. If the jury has been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, the verdict should stand, but the offending juror should be punished. But if such misconduct has wrought prejudice, not only should the juror be punished, but the verdict should also be set aside; but matters resting in the personal consciousness of one juror should not be received to overthrow the verdict, because, being personal, it is not accessible to other testimony." (Emphasis added.)

It is stated in 53 Am. Jur. 772, Section 1109 as follows:

"The rule that the testimony of jurors will not be received to impeach their verdict is subject in many jurisdictions to a recognized exception that affidavits of jurors may be received to show matters occurring during the trial not essentially inhering in the verdict, that is, not falling within or pertaining to the legitimate ssues in the case.

> Thus, there is authority for the view that *while the testimony of jurors cannot be received to show matters which essentially inhere in their verdict, they may testify as to facts occurring within their own personal observation in such a manner that others as well as themselves would be cognizant of them and could testify as to them.*" (Emphasis added.)

Of similar interest is the case of *State v. McCormick*, 57 Kan. 440, 46 P. 777 where the Court there said:

> "While the testimony of jurors cannot be received to show matters which essentially inhere in their verdict, *they may testify to facts which transpired within their own personal observation, and which transpired in such a manner that others, as well as themselves, would be cognizant of them, and could testify to them.*"

The Court there citing *Gottleib v. Jasper*, 27 Kan. 770; *Railroad Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741.

Another case which seems in point is the case of *Merrell v. City of Stillwater* as cited in 249 P2d 715. In this case, the Plaintiff was claiming damages to two basements and the Trial Court ordered the jurors to view the premises. When it was discovered that the jurors made an inspection of only one of the basements, the Plaintiff property owner filed a Motion for New Trial, supported by affidavits showing the misconduct on the part of the jury, which Motion was denied by the trial judge. In reversing the Trial Court and holding that the misconduct of the jury was error justifying a new trial, the Court there said:

"When the trial court invoked the above statute and ordered the jury to view the premises, it became its mandatory duty to examine each basement which was alleged to have been damaged by the negligent acts of the city. The jury had no right to inspect a portion of the premises to the exclusion of the other, and its conduct in so doing violated the legal rights of the Plaintiff. The orderly administration of justice demands that a jury scrupulously observe and follow the instructions of the court. To hold otherwise would be tantamount to condoning the act of a jury in ignoring any given instruction of a trial court. Suppose in this case that the jury, after being ordered by the court to view the premises, had failed to examine any part of the property. Could it be argued that such disregard of the court's instruction would be countenanced or that a new trial should not be granted? We think not. It logically follows that the trial court erred in overruling the motion of the Plaintiff for a new trial."

In the case of *Harrod v. Sanders,* 137 Okl. 231, 278 Pac. 1102, the Trial Court instructed the jury to view certain offices of the Defendant. While in the process of such viewing, one of the jurors became separated and only 11 members of the jury viewed the premises. In granting a new trial, the Supreme Court there held that the failure of the jury to view the premises in a body was such misconduct that the rights of the Defendants were presumed to be prejudiced. In said case the Court stated:

"It has been held that, 'where some of the jurors make an unauthorized view, the irregularity is not cured by direction of the court to the entire jury to make a view, and that, where the act of a juror was in direct disobedience to a ruling

> refusing to allow a view, no inquiry will be made as to whether or not prejudice to a party resulted, but the verdict will be set aside on the broad ground that the misconduct of the juror has a tendency to corrupt and cast suspicion on the administration of justice.' 4 C. J. 954; Helme vs. Kingston, 8 Kulp (Pa.) 221."
>
> "The holding in the case of Helme vs. Kingston, above, we think is founded upon common sense and sound reason, and is in harmony with the proper administration of justice, and should be the rule in this state."

The Court further considering the matter of permitting the use of affidavits of jurors to show misconduct cited with approval and as authority for such use the case of *M., O.G. Ry. Co. v. Smith,* 55 Okla. 12, 155 P. 233, where the Court held:

> "The general rule is that affidavits of jurors are admissible to explain and uphold their verdict, but not to impeach and overthrow it. But this general rule is subject to this qualification: The affidavits of jurors may be received for the purpose of avoiding a verdict to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself, as that the jury considered and were influenced by specific evidence that had not been offered or admitted at the trial; but such evidence is not admissible to show any matter which essentially inheres in the verdict, as that the juror did not assent to the verdict, that he misunderstood the instructions, or any other matter resting alone in the juror's breast."

There can be no doubt but that the unauthorized view was tantamount to the admission of improper evidence.

Furthermore, the affidavits do not conclusively show that all of the jurors participated in the unauthorized view. Consequently, we are not certain, under the circumstances, that all of the jurors had the same evidence before them at the time of their deliberations.

Can it be said under these circumstances that the rights of the Defendant landowners were not jeopardized or prejudiced? We think not.

It being the duty of the Court to safeguard the rights of the parties to a fair trial, we respectfully submit that the Motion for New Trial should have been granted.

CONCLUSION

The Trial Court's genuine concern regarding a view of the premises, we believe, is reflected in the admonition to the jury when the Court stated "the jurors will understand that the property has been . . . on the inside has been changed and altered, *so it would be of no help to be studying the inside of it.* * * *" The Court thus recognized the inherent danger of prejudice developing. The improvements constituting a major part of the damages then became an item of vital interest to be considered by the jury only under the most scrupulous and specified conditions so as to reflect their condition on the date of taking. It is well known and understood by all, that impressions acquired by sight frequently carry a greater impact than a thousand words and to quote a favorite expression of the trial judge in the instant case: "You can take the fly out of the soup but you can't remove the flavor."

Considering the fact that the State of Utah was the responsible party for permitting the premises to be reduced to a shambles and in the dilapidated condition at the time of trial, we feel that an extra duty was owed to assure a fair presentation of the evidence in this regard, and under all the circumstances, believe that it was as prejudicial and unfair to allow the view as it would have been to allow a view if the property had been greatly improved at the time of trial. In other words, neither party should be allowed to "guild the lilly."

The conduct of the jury is not in dispute as evidenced by the affidavits filed by both parties in support of and in opposition to the Motion for New Trial. The use of such affidavits to show such conduct we believe is supported by the better reasoned cases and is in harmony with the principles of fair and complete justice. To permit or condone the jury's conduct in totally disregarding the admonition of the Court cannot be supported under any guise or rule of law.

Under the circumstances, we feel the substantive rights of the Defendant landowners were violated and that the only appropriate redress is a new trial of the case.

Respectfully submitted,

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